U.S. Department of Labor

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Issue Date: 15 December 2004

CASE NO.: 2004-LHC-1259

OWCP NO.: 07-158212

IN THE MATTER OF

RAFAEL ASEVEDO,
Claimant

v.

ADM/GROWMARK RIVER SYSTEM, INC.,
Employer

APPEARANCES:

Jeremiah A. Sprague, Esq.
On behalf of Claimant

Alan G. Brackett, Esq.
On behalf of Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Rafael Asevedo (Claimant) against ADM/Growmark River System, Inc. (Employer). The formal hearing was conducted in Metairie, Louisiana on September 21, 2004. Each party was represented by counsel, and each presented documentary evidence, examined

and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-5 and Employer's Exhibits 1-8. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on February 10, 1999;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on February 10, 1999;
5. A Notice of Controversion was not applicable;
6. An informal conference was held on November 25, 2003;
7. The average weekly wage at the time of injury was $1,005.93;
8. Temporary total disability from July 20, 1999 to November 1, 1999 and from August 14, 2002 to July 25, 2002;
9. Temporary partial disability from February 14, 1999 to July 19, 1999, from November 2, 1999 to November 15, 1999, from January 22, 2001 to August 13, 2002, and from December 8, 2003 to the present and continuing;
10. Medical benefits were paid;
11. Permanent disability and impairment rating are not yet determined; and
12. Date of maximum medical improvement is not yet determined.

[1] The parties were granted time post hearing to file briefs. This time was extended up to and through November 19, 2004. Claimant failed to file a post-hearing brief.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

Issue

The unresolved issue in this proceeding is:

1. Wage earning capacity.

Statement of the Evidence
Testimonial Evidence

Rafael Asevedo

Claimant testified that he began working for Employer as a millwright in 1993 and continued working in that capacity until he was injured. Employer is an importer and exporter of grain. Claimant described the millwright position as involving welding, moving and replacing gear boxes, using large wrenches, and "a lot of heavy stuff." He said the job required him to perform pulling cables and belts, and was mostly heavy lifting. Claimant stated that after he sustained his injury on February 10, 1999, he returned to work for Employer on restricted duty where he did paperwork and entered job orders into the computer.

Claimant recalled a functional capacity examination ("FCE") that he completed on June 27, 2003. He stated that the FCE consisted of him running up and down stairs, climbing up and down a ladder, walking up and down steps, pulling and pushing on a machine, and lifting and lowering heavy boxes. Claimant said that the FCE took him eight hours to complete, and afterwards he suffered pain in his back and legs. Claimant said it took him a week or two to recover from the FCE.

Claimant stated that his level of back pain depends on how much sitting, standing or walking he does. He currently takes several medications, including Neurontin for inflammation, Skelaxin for spasms, Elavil to sleep, and blood pressure medication. Claimant stated that he takes Skelaxin four times per day for the spasms he has in his legs and back, but it makes him drowsy. Claimant testified that as a result of his back pain, he must lay down two or three times every day. He said that if he walks, turns or twists, he feels "rubbing" in his back, so he will lie on the floor for about thirty minutes and his back will "go back in place." Claimant stated he can sit or stand continuously for a couple of hours without having to lay down.

Claimant has not looked for other work since his injury because he felt that he was not capable of doing anything due to his back pain and the medications that he takes, though he did try to work once since having left Employer. Claimant recalled an occasion where his brother, who performs concrete work, called Claimant and asked him to run his crew. Claimant said that running the crew consisted of a lot of walking and bending in order to watch the crew and monitor their work. Claimant worked for four or five hours, but stated he could not stay any longer because he had a great deal of back pain and was working in an area where the ground was not level, requiring Claimant to do a lot of walking up and down.

On cross-examination, Claimant testified that he is a high school graduate and completed a welding course at Jefferson Vocational School. He said that he learned how to be a millwright on the job, he learned how to perform concrete work on the job, and learned how to perform data entry on the job when he returned to work for Employer on restricted duty.

Claimant acknowledged that in his deposition, he said that he had not worked since he left Employer, but testified at the hearing that he worked for one day, because he "just remembered" that he worked for his brother.

Claimant stated that he saw Dr. Johnson when he was in pain as a result of completing the FCE, and Dr. Johnson wanted to perform another MRI but because it was never authorized, Claimant had to pay for the MRI himself. Claimant could not recall whether he had told his physcians about the Skelaxin making him drowsy. He stated that he recently began taking pain medication prescribed by Dr. Awasthi, but could not recall what the medicine was. Claimant said he had been taking the pain medication for about a month, and he took one pill in the morning and one at night. He said that he was still able drive, take his children to school, and run errands.

Claimant testified that he met with two vocational rehabilitation experts, Nancy Favaloro and Thomas Meunier. He stated that Mr. Meunier never sent Claimant on any job interviews or suggested that he look into any type of job placement service. Claimant further testified that Mr. Meunier never sent Claimant any correspondence suggesting what Claimant might do to look for work. Claimant said that even though no doctor has said that he cannot do any type of work, he has nonetheless not looked for work since leaving Employer.

Medical Evidence

Robert A. Steiner, M.D.

Dr. Steiner is an orthopedic surgeon who treated Claimant in 1999. His notes comprise Employer's Exhibit 5. Dr. Steiner diagnosed Claimant with left sciatica due to a left-sided disc herniation at L4-5. On July 15, 2004, in response to an inquiry made by Employer's counsel, Dr. Steiner opined that pain management may be appropriate in Claimant's case.

R. Hugh Fleming, M.D.

Dr. Fleming is a neurologist who treated Claimant, and his reports are found at Employer's Exhibit 6. The records indicate that Dr. Fleming performed electromyocardiogram and nerve conduction studies on Claimant in 1999, 2001, and 2003. Every time the tests were performed, they produced similar results. The EMGs showed evidence of irritability and denervation at the L4-5 levels bilaterally, but slightly greater on the right. The most recent EMG, performed on March 27, 2003, indicated evidence of very mild chronic denervation with no new denervation present. Otherwise, the nerve conduction studies all produced normal results.

Gary R. Glynn, M.D. & Karen J. Ortenberg, M.D.[3]

Dr. Glynn is a physical medicine and rehabilitation physician who began treating Claimant on January 30, 2001. His records comprise Employer's Exhibit 7. Dr. Glynn opined Claimant suffered from chronic low back pain with multilevel pathology and had undergone spine surgery in 1999. Dr. Glynn recommended outpatient and home physical therapy and prescribed Neurontin. The records indicate that Claimant completed a course of physical and occupational therapy. Claimant's last visit was on March 13, 2002, where it was noted that Claimant did not need to continue treatment with Drs. Glynn or Ortenberg as long as he was under the care of Dr. Johnston, but he would be seen again if he elected to have another surgery in the future.[4]

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3 Claimant began treatment with Dr. Glynn but the records indicate that Dr. Ortenberg, an associate of Dr. Glynn's, assumed Claimant's care in June 2001.

4 Dr. Johnston appears to be Claimant's treating physician, or at least the physician who made the majority of the referrals to the various specialists who saw Claimant. Neither party submitted Dr. Johnston's records into evidence.

John C. Steck, M.D.

Dr. Steck, a neurological surgeon, treated Claimant on an intermittent basis from 2001 through 2004. His records are found at Claimant's Exhibit 1. At his initial evaluation of Claimant, Dr. Steck noted that Claimant had already had one surgery but continued to have pain syndrome. He opined that all conservative measures should be explored before any further surgery was considered; however, after reviewing myelograms, Dr. Steck determined that further decompression and lamination was appropriate to relieve Claimant's back and leg pain.

Dr. Steck assisted Dr. Johnston in performing Claimant's second surgery on June 25, 2002. Dr. Steck reevaluated Claimant on January 29, 2004 where he noted Claimant had minimal improvement after the June 2002 surgery, and opined that Claimant's symptoms were due to lumbar spinal stenosis at the level above his previous fusion. Dr. Steck believed that Claimant should have a lumbar myelogram to determine the amount of lumbar stenosis, and restricted Claimant to sedentary work because he did not believe Claimant was capable of working at a medium level capacity.

Deepak Awasthi, M.D.

Dr. Awasthi is a neurosurgeon and associate professor at Louisiana State University Medical Center who first saw Claimant on November 4, 2003. His records comprise Claimant's Exhibit 2. Dr. Awasthi noted that Claimant complained of constant back and leg pain despite two surgeries. Dr. Awasthi recommended further conservative treatment, physical therapy and a pain management program, but acknowledged that if these forms of therapy failed, Claimant may need additional surgery at the L3-4 levels. He noted that the FCE conducted in June 2003 indicated that Claimant was capable of lifting 50 pounds, but Dr. Awasthi opined that it would be difficult for Claimant to return to work where such a duty was required of him, and later stated that he felt Claimant was incapable of lifting 50 pounds and doing so would result in Claimant reinjuring his back (CX 2, p.5).

On April 5, 2004, Dr. Awasthi determined that Claimant was only capable of performing sedentary work with restrictions, including no heavy lifting, pushing, or pulling more than ten pounds, no prolonged periods of sitting or standing without changing positions for longer than one hour, no long distance walking, no climbing or bending, and no stooping for more than 15 minutes (CX 2, p.2).

The most recent notation from Dr. Awasthi, dated June 21, 2004, states that Claimant continued to complain of low back pain and occasional pain in his legs and knees bilaterally. Dr. Awasthi gave Claimant a prescription for Vicodin for pain. Dr. Awasthi said that he again discussed the possibility of additional surgery with Claimant and noted that before any surgery could be performed, a set of diagnostic tests would need to be conducted, including lumbar MRI, myelogram, discogram and x-rays of the spine.

Dr. Awasthi completed a medical opinion affidavit on August 12, 2004 (CX 2, p. 6). Dr. Awasthi stated he was treating Claimant for injuries to the lumbar spine, and recommended an MRI, a lumbar myelogram and post myelogram CT scan, a discogram, and x-rays of the lumbosacral area in order to ascertain the current status of Claimant's fusion, any additional nerve root compression. He opined that Claimant may possibly require an additional fusion at the L3-4 level. He stated that he had recommended pain management for Claimant on November 4, 2003, and reiterated the restrictions he previously placed on Claimant's ability to work. Dr. Awasthi stated that Claimant could walk no more than 100 meters continuously and that it would be necessary for Claimant to lay down at work for 30 minutes if he was experiencing pain.

Other Evidence

Performance Physical Therapy, Inc.

A functional capacity evaluation ("FCE") was performed at Performance Physical Therapy on June 27, 2003. The FCE results comprise Claimant's Exhibit 5. The functional capacity evaluator, Mr. Joseph Shine, P.T., noted that Claimant performed all tests safely and demonstrated consistent, maximum effort.

The FCE results indicated that Claimant demonstrated the ability to lift 35 pounds from the floor to waist level, to transfer 50 pounds, to lift 35 pounds to shoulder level, and to carry 45 pounds a distance of 40 feet. Claimant exhibited a pull force at cart height of 80 pounds and push force of 93 pounds. The results of the FCE led the evaluator to conclude that Claimant demonstrated the ability to work at a medium level with recommended restrictions against prolonged standing, allowing Claimant to occasionally change positions, restricted lifting of more than 35 pounds from the floor, 50 pounds at waist level and carrying 45 pounds, and a restriction for whole body vibration and moving machinery as a precautionary matter. Mr. Shine noted that Claimant's pre-injury employment as a millwright was classified as a medium physical capacity level position.

Nancy Favaloro, M.S., C.R.C.

Ms. Favaloro is a licensed rehabilitation counselor. Her records comprise Claimant's Exhibit 3 and Employer's Exhibit 8. Ms. Favaloro submitted her first vocational rehabilitation report on December 3, 2001, where she noted that she had reviewed Claimant's medical documents, interviewed Claimant, and performed vocational testing (EX 8). The results of these tests indicated that Claimant's letter word identification ability was at a fourth grade equivalent, his passage comprehensions was at a third grade equivalent, calculation was at a sixth grade equivalent, and his applied problem abilities were at a 4.8 grade equivalent. Ms. Favaloro stated that the medical records indicated Claimant was capable of performing work at a light level, which he was then doing in his modified position with Employer. Ms. Favaloro stated she would look for similar employment for Claimant.

Ms. Favaloro issued a second report on January 11, 2002, which included the results of a labor market survey she conducted in the greater New Orleans metropolitan area regarding potential employment for Claimant. Considering Claimant's age, education, and transferable job skills, Ms. Favaloro located six light and/or sedentary positions she opined to be appropriate for Claimant. These positions included central station operator, unarmed security officer, unarmed security guard, production technician, production worker and shuttle bus driver. Of these positions, all except shuttle bus driver were approved by Dr. Ortenberg on January 16, 2002. Ms. Favaloro indicated she had attempted to obtain approval of the jobs by Dr. Johnston, but he never responded.

On April 13, 2002, Ms. Favaloro located six positions with specific employers that she deemed appropriate for Claimant and noted that jobs with the same or similar tasks had been previously approved by Dr. Ortenberg. She notified Claimant of the availability of the positions by letter. These positions included production technician at Allfax Specialties, unarmed security guard at Pinkerton Security, unarmed security officer at Bayou State Security Services, central station operator at Certified Security Systems, booth cashier at New South Parking, hand worker at Kalencom Corp., and security timekeeper at Royal Sonesta Hotel (CX 3, p.1). Ms. Favaloro issued a subsequent report on April 26, 2002 which contained the descriptions of these positions. She stated that Claimant had been informed of these positions, but she confirmed with the potential employers that Claimant did not apply for any of the positions.

On July 16, 2003, Ms. Favaloro submitted a supplemental vocational rehabilitation report which contained an update on Claimant's medical status as he had undergone surgery in June 2002. Ms. Favaloro noted that on May 22, 2003, Dr. Steck, Claimant's neurosurgeon, recommended a return to work program not performing physical work. Accordingly, Ms. Favaloro attempted to locate positions consistent with the light physical demand level.

Seven potential positions were located by the updated labor market survey. The records indicate that the position descriptions were sent to Drs. Steck and Johnston who did not respond to Ms. Favaloro. The positions, their job duties and requirements were described as follows:

(1) Cashier: Basic arithmetic skills required. Employee handles money and should be able to read and follow verbal and written instructions. Job location is in a main lobby and is at a fountain/deli. Alternate sitting, standing and walking throughout the work day. No lifting over five pounds. Wages are $7.00 to $10.25 per hour.
(2) Production worker: On the job training provided to teach employee how to operate jewelry polishing machine. Must be able to read basic descriptions. Employee is mostly seated while working, will lift up to ten pounds. Wages are $6.00 to $6.50 per hour.
(3) Delivery driver: Deliver dental appliances to dental offices throughout the city. Employee drives a company vehicle with automatic transmission. Complete forms as deliveries are made and should be able to follow written directions. Will alternately sit, stand and walk. Lifting is five to ten pounds. Wages are $6.50 per hour.
(4) Casting technician: Worker will learn to operate machines such as grinding machines used to manufacture plastic shells used in hearing aids. Should be able to read basic work orders. Fifty percent of time is spent seated, the other half is spent standing and/or walking. Manual dexterity is required because must use hands to operate machines. Lifting is one to two pounds. Wages are $8.50 to $9.00 per hour.
(5) Unarmed security guard: Worker will complete two eight-hour training classes. Worker can be a gate guard which is mostly sedentary in nature. He can be posted at other sites where he would alternately sit and stand throughout the workday. On the job training is provided. Wages are $6.00 to $7.00 per hour.
(6) Bread packer: On the job training is provided. Worker is required to package bread items into appropriate bags. He will count and place a certain number of items in each bag. May sit on a stool while at work,

and can stand at will. Lifting is ten to fifteen pounds. Wages are $5.50 per hour.

(7) Courier: Worker will deliver lab equipment weighing no more than ten to fifteen pounds to various independent labs. Will drive around the city and should be able to find his way. Will get in and out of the vehicle and keep track of deliveries made. Wages are $6.00 to $7.00 per hour.

On September 9, 2004, Ms. Favaloro issued another report after reviewing the records of Dr. Awasthi and Thomas Meunier, LPC. She noted that Dr. Awasthi's general restriction was sedentary work with no heavy lifting, pushing or pulling greater than ten pounds, no prolonged periods of sitting or standing without change of positions for more than one hour, no long distance walking, no climbing or bending and no stooping for longer than fifteen minutes. Ms. Favaloro stated that these restrictions were used in her effort to locate employment for Claimant.

Six positions were identified with employers who Ms. Favaloro stated had agreed to consider someone with Claimant's profile and work restrictions as specified by Dr. Awasthi. The positions included the following: unarmed gate guard at Relais Esplanade apartments, cashier at Treasure Chest Casino, toll collector, shuttle bus driver at Treasure Chest Casino, parking lot cashier at Standard Parking, and unarmed security guard at Securitas. Ms. Favaloro stated that the positions adhered to Dr. Awasthi's restrictions and paid from $5.50 to $9.00 per hour at entry level. (EX 8, pp.32-34).

Thomas Meunier, Jr., L.P.C., L.R.C.

Mr. Meunier, a licensed rehabilitation counselor, conducted a vocational rehabilitation evaluation of Claimant on May 10, 2004. His records are found at Claimant's Exhibit 4. Mr. Meunier interviewed Claimant, reviewed his medical, vocational and personnel records, and administered several tests including reading comprehension, arithmetic skills, and aptitude tests. Claimant's reading and passage comprehension level was a second or third grade equivalent and his math skills were at a sixth grade level of functioning. Mr. Meunier noted that Claimant's medical records indicated that Claimant was capable of working at the sedentary to light level with some severe postural restrictions.

Mr. Meunier noted that Claimant said he had not looked for work because he was unsure of what he was capable of doing, and felt limited in what he could offer an employer due to his background in heavy manual labor and extremely poor academic skills. Mr. Meunier found Claimant's assessment to be realistic and

opined that Claimant would, at best, be limited to either sedentary or less than the full range of light exertional work at the unskilled or low semi-unskilled level.

Mr. Meunier gave several examples of possible suitable alternative employment that fell into the same occupational category as Claimant's previous employment as a millwright. These positions included buffing machine tender, automatic grinder operator, or cleaner and polisher. He explained that these jobs are considered to be light extertional work, but may be appropriate for Claimant if the employer provided an option for Claimant to alternate sitting and standing while he worked. Mr. Meunier opined that positions such as these rarely have a starting wage of more than $7.50 per hour. He recommended a labor market survey be performed in order to ascertain the availability and wages of suitable work for Claimant in the local area.

On July 23, 2004, Mr. Meunier issued a supplemental report stating he conducted a labor market survey on behalf of Claimant (CX 4, p.1). Mr. Meunier reported that his labor market survey efforts had not produced any positive results with respect to unskilled sedentary employment for Claimant. He said that he consulted the classified advertisements in the local newspaper and could not locate any buffing machine tender, automatic grinder operator, or cleaner/polisher positions that would fit Dr. Awasthi's restrictions. Consequently, in his opinion the potential employment discussed in his previous report was not available to Claimant in the local labor market.

Mr. Meunier also contacted the employers listed in Ms. Favaloro's January 11 and April 12, 2002 labor market surveys, as well other employers who advertise positions similar to those identified by Ms. Favaloro. With respect to security guard positions, Mr. Meunier stated that ADF Security informed him that they do not have any guard positions which require mostly sitting. Bayou State Security informed Mr. Meunier that it does not hire simply gate guards or night watchmen, rather the guards must be able to patrol or stand for most, if not all, of a shift. Pinkerton Security stated that it had one night watchman position that appeared to be suitable for Claimant, but his academic skills would be insufficient to write incident reports which is a required part of the job. The inability to complete incident reports would also reportedly render Claimant an inappropriate candidate for employment with New Orleans Private Patrol, Vinson Guard Service, Wackenhut, Weiser Security, and Vanguard Security according to Mr. Meunier.

Mr. Meunier contacted several employers who hire central station operators. Anchor Alarms relayed to Mr. Meunier that they do hire for this position, but

Claimant's reading and spelling skills were insufficient to perform data input required for the position. Security Center also said that Claimant's academic skills were insufficient to be considered for the position. Alarm Protection Service informed Mr. Meunier that Claimant's literacy level was too low to be considered for a position due to the amount of data input the job required. Electronic Monitoring Service reportedly informed Mr. Meunier that their central station operators must be familiar with computers, and Claimant's literacy skills were insufficient to consider him for the position (CX 4, pp.2-3).

Mr. Meunier inquired with two employers regarding production technician/worker positions, and stated that All Fax Specialties indicated that it was not presently hiring but would accept applications for its production technician position, which required the ability to read instructions, to lift up to 50 pounds occasionally, and 20 pounds on a regular basis. Pedal Valves, Inc., informed Meunier that its production worker position requires lifting of 25 pounds or more, which Mr. Meunier opined would disqualify Claimant based on his sedentary lifting restriction of ten pounds (CX 4, p.3). Claimant's literacy and math skills were reportedly insufficient for him to qualify for a booth cashier position with parking companies including Park One, Standard Parking, Alright Parking, and Airport Parking.

Finally, Mr. Meunier determined that the security timekeeper and hand worker positions identified by Ms. Favaloro in her April 26, 2002 report both required sitting tolerances beyond the restrictions placed upon Claimant and the timekeeper position required literacy skills greater than those possessed by Claimant. Mr. Meunier concluded that based on his own labor market survey and his contacts with employers identified by Ms. Favaloro, no suitable alternative employment had been identified for Claimant as of July 23, 2004. He stated that theoretically, some unskilled sedentary minimum wage work may exist which Claimant would be qualified for, but the availability of such work appeared problematic. Mr. Meunier stated that he could not recommend that additional labor market surveys be performed, but said he would be available to "check on the appropriateness" of employment identified by others (CX 4, p.4).

In her September 9, 2004 report, Ms. Favaloro responded to Mr. Meunier's assertion that the positions she located for Claimant were unsuitable (EX 8, p.31). She stated that Mr. Meunier contacted various employers in 2004 in regards to labor market surveys she had conducted in 2002. She indicated that the information contained in her records was true as of the time she had contacted the employers. For example, she said that Mr. Meunier was informed that Claimant's

academic skills were insufficient for the night watchman position at Pinkerton Security, but when she contacted the employer in December 2001, and in formulating her April 2002 report, it was noted that someone with only basic reading skills could be considered for the position since the worker was required only to write down or copy the name of a truck or trailer as it entered or left the gate. Ms. Favaloro stated that Claimant's academic skills are sufficient for that job.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc*., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co*., 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.,* 16 BRBS 98 (1984). In this case, the parties have stipulated that Claimant was injured in the course of employment on February 10, 1999. Because the evidence supports this stipulation, I find no need to conduct further analysis under Section 20. It is the nature and extent of Claimant's injuries that are the focus of this investigation.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.,* 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). Id. at 60. The parties have stipulated, and the evidence so supports, that Claimant has not yet reached MMI. I accept the parties' stipulation, therefore, any compensation awarded will be temporary in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes, 930 F.2d 424, 430* (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp*., 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co*., 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

There is no dispute that following his injury, Claimant was unable to return to his previous position with Employer, but was relegated to a modified position performing data entry for Employer. However, in issue is whether, after ceasing to work in the modified position, Claimant was able to engage in gainful employment. Claimant contends that he has been temporarily totally disabled since July 2003 when his compensation was suspended, and remains so at present. Employer, on the other hand, asserts that it has fulfilled its burden of establishing that suitable alternative employment was available which Claimant was capable of performing, rendering his disability partial in nature. The sole issue for my determination is whether the existence of suitable alternative employment was established by July 26, 2003, the date Claimant's compensation was terminated.[5]

5 The parties agreed that no issue exists as to compensation paid prior to July 26, 2003.

There are no medical opinions in evidence which state that Claimant can return to his pre-injury employment as a millwright. While Employer argues that the results of the FCE indicated that Claimant was capable of performing work at the medium level, which is the classification of a millwright position, none of Claimant's treating physicians expressly stated that Claimant could return to such work; rather, all of them either placed Claimant at sedentary or light levels of employment. Without physician approval of such a position, I do not find, based only on the results of one FCE, that Claimant was able to return to his pre-injury employment, especially considering Claimant's testimony that performing the tasks required by the FCE resulted in an increase in his pain level for over a week. Consequently, Claimant has established a prima facie case of total disability and the burden shifts to Employer to demonstrate the availability of suitable alternative employment.

Suitable Alternative Employment

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which he is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P&M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for the job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *Turner*, 661 F.2d at 1042-43; *P&M Crane Co.*, 930 F.2d at 430.

In this case, the parties only dispute whether the existence of suitable alternative employment was established as of July 26, 2003. The FCE that was conducted on June 27, 2003 indicated that Claimant was capable of performing work at the medium physical demand level. Despite that fact, Ms. Favaloro's vocational report of July 16, 2003, indicated that she located positions at the light level in accordance with Dr. Steck's recommendation on May 22, 2003, that Claimant return to work "not performing physical work" (EX 8, p.21).[6] Consequently, it is apparent that Ms. Favaloro, in locating potential suitable alternative employment for Claimant, did not consider jobs that required more physical capabilities than those associated with the light physical demand level. Of the four labor market surveys she conducted, in January 2002, April 2002, July 2003 and September 2004, Ms. Favaloro limited her search to either light or sedentary positions.

Employer contends that the labor market survey conducted by Ms. Favaloro on July 16, 2003 establishes the availability of suitable alternative employment and accordingly fulfills its burden, and I agree. In the July report, Ms. Favaloro located seven jobs: cashier, production worker, delivery driver, casting technician, unarmed security guard, bread packer, and courier. Ms. Favaloro stated that all the jobs were considered to be at the light level, according to Dr. Steck's recommendation. None of the jobs required lifting over fifteen pounds, and all entailed either mostly sitting or the ability to alternate between sitting, standing, and walking.

Ms. Favaloro stated that the jobs were "a viable representative sampling of vocational alternatives in his area of residence," and in her professional opinion, these were types of jobs Claimant was able to perform. Also, it is apparent that in making this determination, Ms. Favaloro considered Claimant's high school education, as well as his basic reading and math skills. She likewise indicated the precise nature and terms of each of the identified positions.

With regard to Mr. Meunier's reports, I do not find them persuasive in establishing a lack of suitable alternative employment. Mr. Meunier's first report stated that Claimant could possibly return to light exertional positions provided he could alternate standing and sitting. He gave examples of jobs which fell into the same occupational category as Claimant's previous employment as millwright, and he proceeded to initiate a labor market survey. However, two months later, he

6 The record of Dr. Steck's upon which Ms. Favaloro relied was not submitted into evidence.

opined that there was no suitable work available for Claimant and concluded that another labor market survey was not recommended. Mr. Meunier then attempted to discredit the positions located by Ms. Favaloro, but he did not discuss all of the jobs identified in the July 2003 report. Mr. Meunier also determined that Claimant's academic skills were insufficient for many of the jobs located, but tests conducted by both him and Ms. Favaloro indicate that Claimant possessed basic reading and math skills, which appear to be sufficient for all of the jobs identified by the June 2003 report, especially in light of the fact that Claimant testified he had been performing data entry and handling work orders for Employer.

On April 5, 2004, Dr. Awasthi increased Claimant's work restrictions and limited him to sedentary work with no lifting, pushing or pulling over ten pounds, no periods of prolonged sitting or standing without changing positions for longer than one hour, no long distance walking, no climbing or bending, and no stooping for longer than fifteen minutes. Of the positions identified by Ms. Favaloro in her July 2003 report, only production worker (because it does not indicate that Claimant would be able to alternate sitting, standing and walking), bread packer and courier (because they required lifting ten to fifteen pounds) do not comport with Claimant's restrictions. Otherwise, the remaining jobs identified in the July 2003 survey adhered to Dr. Awasthi's latest restrictions.

In sum, I find that Employer has met its *Turner* burden of establishing suitable alternative employment, and Claimant has not rebutted this showing through a diligent and willing search for employment, as evidenced by his testimony that even though none of his physicians has said he cannot work, he has not attempted to obtain employment since leaving Employer.

Wage Earning Capacity

Claimant is obligated to take employment within his physical restriction and Employer is responsible for the difference between Claimant's new weekly wage and his former weekly wage. When suitable alternative employment is shown, the wages which the new positions would have paid at the time of Claimant's injury are compared to Claimant's pre-injury wage to determine if he has sustained a loss of wage earning capacity. *Richardson v. General Dynamics Corp.,* 23 BRBS 327, 330 (1990). Total disability becomes partial disability on the earliest date that the employer establishes suitable alternative employment. *Palombo v. Director*, OWCP, 937 F.2d 70, 25 BRBS 1(CRT) (2nd Cir 1991). The ultimate objective in determining wage earning capacity is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as

injured. *Devillier v. National Steel and Shipbuilding*, 10 BRBS 649, 660 (1979). The hourly wages of jobs found to be suitable employment for a claimant may be averaged in order to calculate wage earning capacity, which ensures that the post-injury wage earning capacity reflects each job that is available.

In this case, the wages paid by the jobs identified by Ms. Favaloro ranged from $5.50 and $8.50 per hour, and seven possible positions were identified. Because only one of the seven positions offered the high wage of $8.50 per hour, I find that averaging the hourly wages is the fairest method of calculation. Consequently, I find that Claimant's wage earning capacity as of July 26, 2003, was $6.50 per hour. Using a forty hour work week estimate, this figure yields a weekly wage of $260.00. Claimant's compensation will be diminished accordingly.

Mindful, however, of the fairness concerns expressed in Richardson v. General Dynamics Corp., 23 BRBS 330 (1990), Claimant's wages are adjusted to reflect their value at the time of Claimant's February 1999 injury. The National Average Weekly Wage (NAWW) for February 1999 was $435.88, and the NAWW for July 2003 was $498.27. Thus, the 1999 NAWW was approximately 87 % of the 2003 NAWW. Therefore, the wages must be adjusted accordingly. Based on these adjustments, I find that Claimant has a residual wage earning capacity of $226.20 per week.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from July 26, 2003 and continuing, based on an average weekly wage of $1,005.93, reduced by Claimant's wage earning capacity of $226.20;[7]

(2) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(3) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

7 No controversy exists as to compensation paid prior to this time.

(4) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(5) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

So ORDERED this 15th day of December, 2004, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd